No. 82-960

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF AUTHORITIES

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1. Respondent contends (Br. in Opp. 7, 9, emphasis in original) that this case does not present a conflict among the circuits because the cases in which courts of appeals have upheld the Board's *Interboro* doctrine "all involved an employee's actual filing or assertion of a *grievance* pursuant to the collective bargaining agreement," whereas here the employee did not file or assert a grievance but "simply refused to drive truck 244 as assigned and went home." The cases cannot, however, be so easily distinguished, and accordingly, the conflict among the circuits, which petitioner concedes exists (Pet. 11-12), is properly presented by the facts of this case.

In this case employee Brown refused to drive a truck which he honestly and reasonably believed was unsafe.[1] That Brown, in a heated exchange with his supervisor, did not expressly invoke the relevant section of the collective bargaining agreement, does not, as respondent suggests (Br. in Opp. 5), show that he was not asserting a contract right in refusing to drive the truck. An employee cannot be expected to assert his claim with the precision of a lawyer. Cf. *Love* v. *Pullman Co.*, 404 U.S. 522, 526-527 (1972). In any event, Brown filed a grievance pursuant to the contract at the first opportunity after respondent discharged him for his refusal to drive the truck (Pet. App. 3a). Since Brown's refusal was based on the unsafe condition of the truck—a matter specifically covered by the contract which the supervisors would be presumed to know—the employer was put on notice that a contractual provision was implicated by Brown's refusal, and this was confirmed when Brown subsequently filed his grievance, relying on Article XXI, Section 4 of the agreement (Pet. 4 n.2).

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[1]Respondent's challenge (Br. in Opp. 4, 9 n.8) to the Board's finding that Brown had a reasonable and honest belief that truck 244's brakes were unsafe was not ruled on by the court of appeals and hence is not properly before this Court. In any event, it is clear that there is ample evidentiary support for the Board's finding. Thus, as shown in the petition (Pet. 2-4), on Saturday, May 12, 1979, Brown was aware that fellow employee Hamilton had complained about the brakes on truck 244 and had left the truck with mechanics Castelono and Ammerman, who promised to fix it over the weekend or Monday morning. Very early Monday morning, when Brown, who started to drive truck 245, reported to mechanic Ammerman that one of the wheels was defective, Ammerman told him that he would be unable to fix the truck that day because of the backlog of trucks in need of repair. In these circumstances, when Supervisor Madary then asked Brown to drive truck 244, Brown could reasonably have believed that this truck was part of the backlog and had not yet been repaired. This belief was confirmed when Madary, in responding to Brown's refusal to drive truck 244 because it had "problems," failed to indicate that the problems had been corrected, and instead remarked that "half [the trucks around here] [had]

Nor is a different conclusion warranted because Brown refused to drive the truck and filed his grievance only after he was discharged, instead of consenting to drive the truck and then filing a grievance. At the time Brown refused to drive the truck and went home, he was not told that his conduct would result in discipline. And, since the collective agreement (Pet. 4 n.2) expressly grants to employees the right to refuse to operate unsafe equipment, there was no reason why he should file a grievance in the absence of adverse action or the threat of adverse action. Indeed, where, as here, the employee is raising a safety complaint, it is hardly reasonable to expect him to operate the unsafe equipment *first* and grieve *later*. Cf. *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 12 (1980) ("It would seem anomalous to construe [the Occupational Safety and Health Act] * * * as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.").

Nor does the timing of the grievance in this case distinguish it from those cases upholding the Board's *Interboro* rule. In *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 496-497 (2d Cir. 1967), the employees, *inter alia*, refused to work separately, claiming that the collective bargaining agreement required employees to work with a partner. Similarly, in *NLRB* v. *John Langenbacher Co.*, 398 F.2d 459, 461 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969), the employees refused to work a split shift without the premium pay which they contended the contract provided. Thus, in both of those cases, as here, the employees refused to perform work which they believed to be in violation of the contract.

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problems' "and that if respondent tried to deal with all of them it would be unable to do business. Moreover, when Brown asked whether Madary was going to "put the garbage ahead of the safety of the men," Madary did not respond (Pet. App. 13a-14a).

In sum, there is no meaningful difference between the situation here and those in the other cases in which the courts of appeals have upheld the Board's *Interboro* doctrine. Moreover, the court of appeals in this case did not reject the *Interboro* doctrine on the basis of Brown's failure to file a grievance before he was discharged (Pet. App. 3a-4a).

2. Respondent also asserts (Br. in Opp. 12) that this case is not important because Brown had other avenues of redress against respondent that he failed to pursue. Specifically, respondent notes that Brown had a contractual remedy if the collective bargaining agreement excused his refusal to drive the truck, and that, while he pursued his grievance through the initial stages of the grievance procedure, he pressed it no further (*ibid.*). Respondent ignores the fact, however, that the third stage of the grievance procedure, taking the grievance to a Board of Arbitration, could be invoked only by the Union, which declined to do so.[2] In addition, absent exhaustion of the contract grievance procedure, Brown also had no right to file an action for wrongful discharge under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, unless he could prove that the Union breached its duty of fair representation. *Vaca* v. *Sipes*, 386 U.S. 171, 186 (1967). In any event, even if Brown had other means of recourse available to him, these could not foreclose the Board from protecting Brown's Section 7 (29 U.S.C. 157) rights after it found that respondent wrongfully discharged him. See Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160(a).

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[2]The fact that the Union may have decided not to take Brown's grievance to arbitration does not indicate that he did not have a reasonable belief that the truck was unsafe. A union may have a variety of reasons for refusing to incur the time and expense of arbitration. See *Vaca* v. *Sipes*, 386 U.S. 171, 191-192 (1967). In any event, an

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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employee's assertion of a safety complaint may not be deemed unreasonable merely because his position is not ultimately upheld in a grievance proceeding. As Judge MacKinnon stated in his concurring opinion in *Banyard* v. *NLRB*, 505 F.2d 342, 350 (D.C. Cir. 1974):

> Even though Banyard's position * * * ultimately proved erroneous, his position was not unreasonable. * * * As long as Banyard acted with a reasonable and good faith belief that his interpretation of the contract was correct, the National Labor Relations Act protects his concerted efforts to enforce that interpretation. Otherwise, employees would be discouraged from asserting interpretations favorable to themselves except in the clearest situations involving unambiguous contract language. In other words, the employee is protected when he engages in concerted activity to enforce a reasonable and good faith interpretation of the contract, even though his interpretation ultimately does not prevail.

See also *NLRB* v. *John Langenbacher Co.*, *supra*, 398 F.2d at 462-463.